

**SCHEDULE 1**

**FORM 1**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS  
BOARD**

**APPLICATION NO.2/2006 OF 12<sup>TH</sup> JANUARY, 2006**

**BETWEEN**

**PRINTLINKS INTERNATIONAL LIMITED ..... APPLICANT**

**AND**

**GOVERNMENT PRINTER, OFFICE OF THE PRESIDENT .....  
PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Government Printer, Office of the President (Procuring Entity) dated 17<sup>th</sup> November, 2005 in the matter of Tender No.GP/7/2005-2006 for Installation and Commissioning of Security Equipment/Machines at Government Press Extension.

**PRESENT:**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. Joshua W. Wambua	-	Member
Eng. D. W. Njora	-	Member
Mr. Kenneth N. Mwangi	-	Secretary/Director of Public Procurement Directorate

## **BOARD'S DECISION**

At the hearing of this appeal, Mr. C.N. Kihara, Advocate for Vigab Hardware Traders, an interested candidate, raised two preliminary objections. We now deal with the preliminary objections as follows:-

### **1. Is the Appeal Filed out of Time?**

The objection by Vigab Hardware Traders, the interested candidate, is that the Memorandum dated 10<sup>th</sup> January, 2006 by the Applicant was filed out of the prescribed time for filing of an appeal and hence offends the provisions of Regulation 33(1) and 40(3) of the Exchequer and Audit (Public Procurement Regulations, 2001).

The interested candidate pointed out that the letter of notification of award to the tenderers was dated 18<sup>th</sup> November, 2005. This Appeal was filed on 12<sup>th</sup> January, 2006 though it was signed on 10<sup>th</sup> January, 2006 and thereafter the twenty one days Appeal window expired on 9<sup>th</sup> December, 2005. The interested candidate further argued that the Applicant's conduct showed that it was aware of the award in that on 22<sup>nd</sup> December, 2005 it wrote a complaint on the tender to the Permanent Secretary, Office of the President.

The interested candidate urged the Board to dismiss this Appeal on this ground. In response the Applicant represented by Mr. Kelvin Mogeni, Advocate, stated that it received the notification of award on 3<sup>rd</sup> January, 2006. It stated that though the letter was dated 18<sup>th</sup> November, 2005, it only collected the letter on 3<sup>rd</sup> January, 2006 after, Mr. Charles Munge, the Applicant's Managing Director was called by one Caroline Wachira, an employee of the Procuring Entity.

Mr. Charles Munge stated that he had visited the offices of the Procuring Entity severally but Mr. Okubasu, the Government Printer, informed him that the award had not been made. That allegation was strongly denied by Mr. Okubasu. The Applicant stated that it instructed Mr. Kelvin Mogeni, its Advocate, to write the letter dated 22<sup>nd</sup> December, 2005 as it had information that the award had been made though it had not received the official communication. The letter dated 22<sup>nd</sup> December, 2005 read as follows:-

"KM/315

22<sup>nd</sup> December, 2005

Permanent Secretary  
Office of the President  
NAIROBI.

Dear Sir

Tender No.GP/7/2005-2006  
Installation Commissioning of Security  
Equipment/Machines at Government Press Extension

I act for Print Links International Limited and refer to the above tender that was awarded to VIGAB HARDWARE LIMITED.

I have conducted a search at the Company's registry and I have been informed as per the enclosed copy of Registrar's letter that there is no such company registered as such. My further search reviewed that there is a business registered on 29<sup>th</sup> June, 2005 as VIGAB HARDWARE TRADERS whose business is to sale (sic) hardware.

The date of registration as per the enclosed copy of Business Names register was a day before the tender aforesaid was advertised on 30<sup>th</sup> June, 2005. The postal address is given as P.O. Box 682-076, Langata (also non existent). The aforesaid scenario clearly shows a predetermined plan to grant this particular tender to this (sic) persons as they have no previous record of dealing with installation and procurement of the security printing equipment as laid out in the tender and all its particulars or being a player in the printing industry and it (sic) a surprise that – it was short listed and subsequently granted the bulk of the tender. It is apparent that the evaluation committee chose to ignore the anomaly and therefore may lead to the loss of millions of shillings of public funds.

I am instructed to seek your immediate intervention in the cancellation of the award of the tender to the said non existent company failing which I have instructions to appeal to the Procurement Appeals Board.

I have taken liberty to copy this letter to the Director of the Kenya Anti-Corruption Commission with the enclosures for their further action as the facts show an element of insider dealing and corrupt practices.

Yours faithfully

Kelvin Mogeni  
Rw

cc. KACC  
Government Printer  
Director, Public Procurement Appeals Board

The Applicant urged the Board to dismiss the preliminary objection as the Appeal was filed within time.

The Procuring Entity stated that all the tenderers were notified on 18<sup>th</sup> November, 2005. It produced the Dispatch Register (G.P. 54) where all the letters of notification were recorded. It stated that the Applicant was called to collect the letter on 18<sup>th</sup> November, 2005 but its representative, after collecting the letter, refused to sign the register. The Procuring Entity urged the Board to uphold the preliminary objection and dismiss the Appeal. The Board has considered the arguments by the parties and all the documents submitted.

It is not in dispute that the letters of notification are dated 18<sup>th</sup> November, 2005. However, there is no evidence that the letter were delivered or collected by the tenderers on that day. The register produced by the Procuring Entity showed that various tenderers collected their letters of notification on 20<sup>th</sup> December, 2005. There is no evidence that the Applicant was notified to collect the letter on 18<sup>th</sup> November, 2005. However, it is clear that by 22<sup>nd</sup> December, 2005, the Applicant was aware of the award of the tender as indicated in their Advocate's letter dated 22<sup>nd</sup> December, 2005 where he stated that he had instructions to appeal if the tender was not cancelled.

Taking the date of 22<sup>nd</sup> December, 2005 when the Applicant wrote the letter to the Permanent Secretary as the date when the Applicant became aware of the outcome of the tender award, the last date for filing the appeal would have been 12<sup>th</sup> January, 2006, i.e. the date when it was filled.

In the absence of evidence to the contrary by the Procuring Entity that it notified the Applicant on 18<sup>th</sup> November, 2005 the submission that this appeal was filed out of time cannot succeed.

Accordingly, the Board holds that the Appeal was filed within time and dismisses this preliminary objection.

## **2. Does the Board have Jurisdiction to Hear the Appeal?**

The second preliminary objection by Vigab Hardware Traders was that the Board has no jurisdiction to hear this Appeal as the contract between the Procuring Entity and the successful tenderer is already being implemented. The interested candidate argued that the work is now in progress and that it had already performed 65% of the project. It further argued that on 22<sup>nd</sup> December, 2005 it was issued with the Local Service Order No.A 016785 for Item No.6, which is the subject of this Appeal, and Local Service Order No.016786 for Item No.7, each for Kshs.25,000,000/=, for Installation and Commissioning of Security Equipment/Machines at Government Press Extension for tender No.GP/7/2005-2006. The interested candidate also showed the Board photographs indicating the implementation status of the project and argued that as the contract is partially performed, this Board has no jurisdiction in view of Regulation 40(3). The said Regulation provides as follows:-

" Once the procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission in the process leading up to that stage shall not be entertained through administrative review."

The Procuring Entity confirmed that it has already issued the Local Service Orders and that the work is in progress and it urged the Board to uphold the preliminary objection. It stated that the Local Service Orders had been wrongfully issued to Vigab Hardware Ltd but the error was later corrected to read Vigab Hardware Services.

The Applicant on its part urged the Board to dismiss the preliminary objection arguing that the contract is not yet signed which is confirmed in paragraph 6 of the interested parties submissions. It also stated that the Local Service Orders were issued to Vigab Hardware Ltd which never participated in the tender. It stated that since the Local Service Orders were issued to a party who did not participate in the tender this Board has jurisdiction to hear the Appeal.

The Board has considered the arguments by the parties and all the documents submitted. We note that the Local Service Order

No. A016785 that is the subject of this appeal was raised on 8<sup>th</sup> December, 2005 and the last officer signed on 20<sup>th</sup> December, 2005. The said Local Service Order was initially issued to Vigab Hardware Ltd and later amended to read Vigab Hardware Services.

The Board wishes to observe that even if all the tenderers were notified on 18<sup>th</sup> November, 2005 as submitted by the Procuring Entity, the twenty-one days appeal window as provided by Regulation 33(1) was to expire on 9<sup>th</sup> December, 2005. The Procuring Entity therefore acted irregularly and in breach of the Regulations by raising the Local Service Orders on 8<sup>th</sup> December, 2005 before the expiry of the twenty-one days appeal window. Such a Local Service Order cannot be a legally valid instrument as it was issued in breach of the law.

Though there is a glaring irregularity that is apparent in the issuance of the Local Service Order, the Board's hands are held by the fact that the successful tenderer is on site and has executed about 65% of the project. In the public interest and in order to safeguard the public funds already expended on the project, the Board has decided not to interfere with the on-going works. Accordingly this preliminary objection is upheld.

Taking into account the rulings on the two preliminary objections, the Board has decided not to proceed to the full hearing of the complaint and hereby dismisses this appeal.

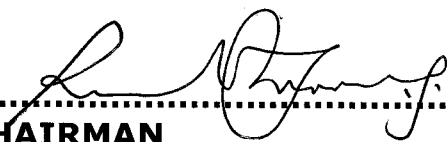
Notwithstanding the upholding of the second preliminary objection, the Board wishes to make the following observation of the tender process:-


1. The successful tenderer was registered as a business name on 29<sup>th</sup> June, 2005 and the tender was first advertised on 28<sup>th</sup> June, 2005. The successful tenderer was appointed as sub-dealer for providing services in Kenya by Indo-European Machinery Company Co. PUIT Ltd on 7<sup>th</sup> July, 2005 when the tender process was ongoing.

We wish to draw the attention of the Procuring Entity to the Regulation 13 that deals with qualifications of tenderers and wonder whether the successful tenderer fulfilled the requirements.

2. The Tender Committee was not properly constituted as per the Regulations since its Secretary is not a Procurement Officer contrary to the First Schedule of the Regulations.

**Dated at Nairobi this 10<sup>th</sup> day of February, 2006**

  
.....  
**CHAIRMAN**  
**PPCRAB**

  
.....  
**SECRETARY**  
**PPCRAB**

